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**SUPREME COURT OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT**

People v. Montes¹
(decided November 24, 2009)

A jury convicted Omar Montes of criminal possession of a

¹ 893 N.Y.S.2d 515 (App. Div. 1st Dep't 2009). Subsequently, on February 17, 2011, the New York Court of Appeals held that "[t]he trial court did not abuse its discretion in denying defendant's motion for a mistrial or to strike Ceballo's testimony because the inability to recall Ceballo did not violate defendant's rights under the Confrontation Clause." *People v. Montes*, 2011 WL 534082 (N.Y. 2011). The Court noted that there is no authority which holds that the guaranteed right of confrontation "includes a right to recall a witness and confront her about things she did or said after her cross-examination, conducted without any restriction of which defendant complains [because these out-of-court statements in fact helped the defendant], was already completed." *Id.* Notably Chief Judge Lippman wrote a concurring opinion stating that although he agreed the decision should be affirmed, he nevertheless did not agree with the majority that this affirmance should be based on rejecting the defendant's confrontation clause claim. *Id.* (Lippman, C.J., concurring). Rather, Lippman joined in the affirmance of the decision because by acquitting Montes of murder in the second degree and criminal possession of a weapon in the second degree, "the jury decisively rejected Ceballo's account and, accordingly, it does not appear that the defendant ultimately was prejudiced by the jury's consideration of her incompletely vetted testimony." *Id.* Lippman stated that when "testimony adverse to the defendant upon a non-collateral matter has been placed before the jury and the defendant has not been afforded an opportunity fully and fairly to test that testimony by cross-examination, the right of confrontation has been infringed." *Id.* Thus, according to Lippman:

Inasmuch as Ceballo was the only witness who claimed to have seen [the] defendant engage in conduct likely incident to the actual use of a gun against the victim, the circumstance that her account of the relevant events was not in crucial respects fully explored and tested before the jury constituted a denial of the right of confrontation. Nor does it seem questionable that this denial raised a substantial danger of prejudice. It appeared at the time of defendant's motion to strike that Ceballo's testimony would, if credited, in combination with the forensic evidence strongly militate in favor of a verdict convicting defendant of murder. In this context, any evidence that Ceballo had not been truthful about her role in the events directly at issue was, from [the] defendant's perspective, absolutely to be brought to the jury's attention through cross-examination; a stipulation was not a substitute for vigorous confrontation of the witness in open court

Montes, 2011 WL 534082 (emphasis added).

weapon in the third degree for his involvement in the shooting death of Robinson Lopez and sentenced him to a term of seven years in prison.² On appeal, Montes claimed the trial court denied his constitutional right to confront a witness pursuant to the Sixth Amendment of the United States Constitution³ and article I, section 6 of the New York State Constitution.⁴ Specifically, Montes argued that the trial court denied him the opportunity to recall a key witness and cross-examine her with regard to key evidence—evidence the witness revealed to the prosecutor after the defense’s initial cross-examination—which damaged the witness’ credibility and supported his innocence.⁵ The appellate division affirmed the conviction since the “[d]efendant had already had a full opportunity to cross examine [the witness],” and, in the alternative, ruled that even if the trial court committed error, the error was harmless beyond a reasonable doubt.⁶

On June 3, 2004, an argument occurred between Lopez, Lopez’s ex-girlfriend, Loraine Ceballo, and her friend Tamika Taylor.⁷ Lopez insulted Ceballo’s new boyfriend, Charles Gonzalez, who soon arrived at the scene with the defendant, Montes.⁸ An argument ensued and shortly afterwards the police received a radio communication of “shots fired,” and found Lopez dead behind a building.⁹ Upon investigation, the police recovered one bullet and nine .380 caliber shell casings from the scene.¹⁰ After further ballistic testing, the officers concluded that six shell casings originated from one gun and the remaining three shell casings originated from another gun.¹¹ However, all four recovered bullets, one from the scene and three from the autopsy, derived from a single gun.¹²

² *Montes*, 893 N.Y.S.2d at 515-16.

³ U.S. CONST. amend. VI, which states in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”

⁴ N.Y. CONST. art. I, § 6, which states in pertinent part: “In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her.”

⁵ *Montes*, 893 N.Y.S.2d at 517-18.

⁶ *Id.* at 518.

⁷ *Id.* at 516.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Montes*, 893 N.Y.S.2d at 516.

¹¹ *Id.*

¹² *Id.*

At trial, Ceballo testified that she observed Gonzalez and Montes approach Lopez's car and "raise their hands 'in a fist form,' and saw that they were holding something in their hands."¹³ When questioned at trial whether she could identify the objects in their hands, Ceballo stated she could not; however, during a prior interview with detectives regarding the investigation, as well as during her grand jury testimony, Ceballo stated definitively that both men held guns.¹⁴ Further, Ceballo testified at trial that after she heard three shots fired, both Gonzalez and Montes ran past her in the building's lobby empty-handed.¹⁵

After Ceballo's testimony, both direct and cross-examination, the prosecutor's office re-interviewed Ceballo and Taylor.¹⁶ During the interview, outside of Ceballo's presence, Taylor admitted that "she and Ceballo ran into the building *with* the two men," and Gonzalez "put a gun or guns in Ceballo's purse after the shooting."¹⁷ Ceballo, when confronted by Taylor in front of the prosecutor, acknowledged these facts; however, she "went 'back and forth' on whether she received one or two guns, and said that she did not know."¹⁸ The following day, Taylor testified in court that "Gonzalez put at least one gun in Ceballo's purse."¹⁹ Further, she stated that she and Ceballo "boarded the elevator . . . and [Ceballo] asked, '[W]hat am I going to do with the guns?'"²⁰

In addition to the testimony provided by Ceballo and Taylor, Dominick Castro, the victim's close friend, testified as an eyewitness to the shooting, stating that Gonzalez possessed the only gun at the scene, shot Lopez once, and continued to shoot while Montes stood with his arms crossed watching from a distance.²¹ The People also called another witness, Carlos Pino, after Ceballo revealed the information regarding the gun or guns she received from Gonzalez.²² Pino testified that Taylor informed him that Gonzalez shot Lopez and

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Montes*, 893 N.Y.S.2d at 516.

¹⁶ *Id.*

¹⁷ *Id.* (emphasis added).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Montes*, 893 N.Y.S.2d at 516.

²¹ *Id.* at 519 (Abdus-Salaam, J., dissenting).

²² *Id.* at 520-21.

further that the defendant called Pino “asking him to call Taylor to find out what ‘that girl did with them things.’”²³ Additionally, Pino testified that Taylor informed him Gonzalez placed *two* guns in Ceballo’s bag after the shooting.²⁴

Since Ceballo failed to testify regarding the placement of a gun or guns in her purse, the defense requested that the court recall Ceballo for further cross-examination.²⁵ However, the request was denied because Ceballo, after enduring what the court described as “a consummately skillful and exhaustive cross examination,” suffered severe emotional injuries and attempted suicide.²⁶ Consequently, the “[d]efendant moved for a mistrial or, alternatively, to strike Ceballo’s testimony.”²⁷ The trial court denied the motion, stating that “the issue of whether Ceballo was given one or more guns was [only] a minor portion of her testimony.”²⁸

Additionally, the court denied the defendant’s request to provide a missing witness charge for Ceballo to the jury.²⁹ As a result of this denial, the parties entered into a stipulation, which stated that “Ceballo was not honest when she testified . . . [,] she failed to state that . . . Gonzalez . . . gave her the gun or guns,” and that “Ceballo is unavailable to be recalled by either side.”³⁰ The jury convicted Montes “of criminal possession of a weapon in the third degree,” and acquitted him of “murder in the second degree and criminal possession of a weapon in the second degree.”³¹ The defendant received a sentence of “the statutory maximum of seven years in prison.”³²

Montes appealed the decision, alleging the trial court abused its discretion by denying his right to recall and further cross-examine Ceballo pursuant to the Confrontation Clause of the United States and the New York State Constitutions.³³ The appellate division affirmed

²³ *Id.* at 521.

²⁴ *Id.*

²⁵ *Montes*, 893 N.Y.S.2d at 517 (majority opinion).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Montes*, 893 N.Y.S.2d at 517.

³¹ *Id.*

³² *Id.* The defendant also claimed his sentence was excessive and requested the court to reduce it. *Id.* at 518. On appeal, the court did not “find it necessary to substitute [its] discretion for that of the trial court to reduce the sentence.” *Id.* at 519.

³³ *Montes*, 893 N.Y.S.2d at 517-18.

the ruling of the trial court, holding that because a trial judge retains broad discretion to limit the defendant's questioning of witnesses, the trial judge correctly determined that the "defendant's right to confront Ceballo was protected, since he was afforded the 'opportunity to probe and expose . . . infirmities' in Ceballo's testimony."³⁴ The court noted that in addition to already conducting adequate cross-examination of Ceballo, the defense counsel "had ample opportunity to engage in cross-examination of two [other] witnesses" on the issue of whether Ceballo received a gun or guns following the shooting.³⁵ Furthermore, the court stated that the defendant, through the stipulation, fully resolved the issue of Ceballo's credibility with the jury, which itself "weigh[ed] heavily against a finding of a constitutional violation."³⁶ Ultimately, the court held that "even if the trial court erred by failing to declare a mistrial or striking Ceballo's testimony . . . the error was harmless . . . [because] the evidence amply established [the] defendant's guilt of criminal possession of [a] weapon in the third degree."³⁷

Justice Abdus-Salaam dissented on two grounds.³⁸ First, although the majority concluded that the defense was afforded a full opportunity to cross-examine Ceballo, the majority "misse[d] the point that [the] defendant had no opportunity to cross-examine her regarding the bombshell revelation about having been given the gun or guns."³⁹ Second, "the trial court abused its discretion in failing to strike Ceballo's testimony," and further, the dissent rejected the majority's argument that even if the trial court erred, the error was harmless beyond a reasonable doubt.⁴⁰

The dissent emphasized the importance of Ceballo's testimony to the prosecution's case.⁴¹ Although the defense had an opportu-

³⁴ *Id.* at 518 (quoting *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985)).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* The majority refers to evidence of one bullet and nine .380 caliber shell casings recovered from the crime scene. *Montes*, 893 N.Y.S.2d at 516. The ballistics investigation revealed that six shell casings originated from one gun and the remaining three from a second gun. *Id.* Investigators deemed the shell casings " 'fresh,' meaning that they did not appear to have been there for any length of time because they were not crushed or disturbed." *Id.* at 522 (Abdus-Salaam, J., dissenting).

³⁸ *Id.* at 519.

³⁹ *Id.* at 520.

⁴⁰ *Montes*, 893 N.Y.S.2d at 519.

⁴¹ *Id.* at 522.

nity to cross-examine two other witnesses regarding the issue of the gun or guns Ceballo possessed, the dissent argued “this was no substitute for cross-examination of . . . the only . . . [witness] with personal knowledge as to whether she had been given one or two guns.”⁴² While the majority reasoned that the stipulation reached by the parties resolved the issue of Ceballo’s credibility entirely against the prosecution, the dissent concluded that:

Stipulations cannot substitute for confrontation, because confrontation envisions a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.⁴³

Contrary to the conclusion of the majority, which held that even without Ceballo’s testimony the evidence of the case sufficiently established the defendant’s guilt, the dissent argued that without the testimony of Ceballo—the only eyewitness who testified to seeing the defendant with a gun—the forensic evidence fell far short of establishing the defendant’s guilt.⁴⁴ While the majority placed great weight on the fact that the police investigation confirmed the existence of shell casings from two different guns at the scene, the dissent stated that “*the forensic evidence does not show that there were two guns at the scene at the time of the shooting*, only that at some point, there was a gun fired in the parking lot that was different from the gun that was used to shoot the victim.”⁴⁵ Without Ceballo’s testimony, the prosecution’s case against the defendant lacked merit; thus, as the dissent argued, the majority erred in holding “that the failure to

⁴² *Id.* at 520.

⁴³ *Id.* at 521 (quoting *People v. Chin*, 490 N.E.2d 505, 511 n.3 (N.Y. 1986)) (internal quotation marks omitted). For more information regarding the use of stipulations and whether a stipulation can substitute as a replacement for a defendant’s right to confrontation, see *Mattox v. United States*, 156 U.S. 237 (1895). See generally David J. Tess, *Losing the Right to Confront: Defining Waiver to Better Address a Defendant’s Actions and Their Effects on a Witness*, 27 U. MICH. J.L. REFORM 877, 881-92 (1994) (discussing that a defendant may lose the right to confront a witness).

⁴⁴ *Montes*, 893 N.Y.S.2d at 522.

⁴⁵ *Id.*

strike Ceballo's testimony was harmless error."⁴⁶

Since a conviction must not be set aside if the court can confidently state that the constitutional error was harmless beyond a reasonable doubt, the dissent argued the majority could not, with confidence, declare that the trial court committed error, harmless beyond a reasonable doubt; therefore, the dissent found that the conviction must be reversed.⁴⁷

The United States Federal Courts, in determining whether a defendant's constitutional rights have been violated, strongly rely on the fundamental necessity of a criminal defendant's right to confront the witnesses against him. In *Pointer v. Texas*,⁴⁸ the Supreme Court held that the use of the transcript of a witness' testimony at a preliminary hearing denied the defendant his Sixth Amendment right to confront and cross-examine the witnesses against him.⁴⁹ During the preliminary hearing, the defendant represented himself and failed to conduct a cross-examination of the victim Kenneth Phillips; however, he cross-examined other witnesses during the same hearing.⁵⁰ Before the trial, Phillips moved to California and, as a result, the prosecution "offered the transcript of Phillips' testimony given at the preliminary hearing as evidence against [the defendant]."⁵¹ The defendant, who obtained outside counsel prior to the trial, objected to the offering of the transcript as evidence, as this denied the defendant his right to confront the witnesses against him.⁵² The trial court overruled the objection because the defendant, at the preliminary hearing, possessed the opportunity to cross-examine the witnesses against him.⁵³ The Texas Supreme Court affirmed the decision and the Supreme Court of the United States granted certiorari to consider the constitutional claim.⁵⁴

The Court reasoned that since the Framers of the Constitution included the right to confront witnesses through cross-examination in the Sixth Amendment, the right to confrontation was a fundamental

⁴⁶ *Id.* at 522-23.

⁴⁷ *Id.* at 523. See *Delaware v. Van Arsdall* (*Van Arsdall I*), 475 U.S. 673, 681 (1986).

⁴⁸ (*Pointer I*), 380 U.S. 400 (1965).

⁴⁹ *Id.* at 407-08.

⁵⁰ *Id.* at 401.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Pointer I*, 380 U.S. at 402.

⁵⁴ *Id.*, cert. granted, *Pointer v. Texas* (*Pointer II*), 379 U.S. 815 (1964).

right essential to a fair trial.⁵⁵ As such, the Court held that the defendant's conviction must be reversed since the preliminary hearing testimony offered into evidence denied the defendant his constitutional right to confront the witness.⁵⁶

Similarly, in *Davis v. Alaska*,⁵⁷ the Court relied on the fundamental protections of the Confrontation Clause when it held that the Alaska Supreme Court improperly limited questioning regarding a witness' possible bias due to the witness' probationary status as a juvenile delinquent and therefore violated the defendant's constitutional right to cross-examine a witness under the Confrontation Clause.⁵⁸ In *Davis*, the defendant allegedly stole a safe from a bar in Anchorage, Alaska.⁵⁹ State troopers discovered the safe, pried open and emptied of its contents, near the home of Jess Straight and his family.⁶⁰ Richard Green, Straight's stepson, informed investigators that he observed two "Negro men standing alongside a late-model metallic blue Chevrolet sedan near where the safe was . . . discovered."⁶¹ Subsequently, Green identified the defendant as one of the men he encountered and recalled the defendant's possession of "something like a crowbar in his hands."⁶²

Before trial, the prosecution moved for a protective order to prevent the defense from cross-examining Green regarding his juvenile record.⁶³ Rather than introducing the evidence to impeach Green's character as an honest witness, the defense requested that the court allow questioning to inform the jury that at the time he assisted police in the investigation, Green continued to serve probation for a prior burglary.⁶⁴ However, the trial court granted the protective order and denied the defense the opportunity to completely cross-examine

⁵⁵ *Id.* at 404.

⁵⁶ *Id.* at 407-08.

⁵⁷ 415 U.S. 308 (1974).

⁵⁸ *Id.* at 318.

⁵⁹ *Id.* at 309.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Davis*, 415 U.S. at 310 (internal quotation marks omitted).

⁶³ *Id.* at 310-11 ("Green was on probation . . . for burglarizing two cabins.").

⁶⁴ *Id.* at 311. The defense believed that "[n]ot only might Green have made a hasty and faulty identification of petitioner to shift suspicion away from himself as one who robbed the Polar Bar, but Green might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation." *Id.*

Green and inform the jury of his prior burglary conviction.⁶⁵

By holding that the limitation on the defense's questioning violated the defendant's right to effectively cross-examine witnesses, the Court referred to the importance of cross-examination.⁶⁶ The Court stated that:

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.⁶⁷

Thus, in light of the importance of cross-examination, the Court refused to "accept the Alaska Supreme Court's conclusion that the cross-examination that was permitted . . . was adequate to develop the issue of bias properly to the jury."⁶⁸

Expanding on the Supreme Court's precedent, *Delaware v. Fensterer*⁶⁹ recognized that although a defendant's right to confrontation remained a critical aspect of a fair trial, and accordingly required the utmost protection, this right was not without limits. The Court stated that the Confrontation Clause afforded the defense "a full and fair opportunity to probe and expose . . . infirmities [in a witness' testimony] through cross-examination."⁷⁰ Further, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."⁷¹ For this reason, the ability to cross-examine is not limitless; "trial judges retain wide latitude to

⁶⁵ *Id.*

⁶⁶ *Davis*, 415 U.S. at 316.

⁶⁷ *Id.*

⁶⁸ *Id.* at 318.

⁶⁹ 474 U.S. 15 (1985).

⁷⁰ *Id.* at 22. See *People v. Mercardo*, 655 N.Y.S.2d 474, 474 (App. Div. 1st Dep't 1997) (holding "[t]here was no violation of the Confrontation Clause because the defense was given the opportunity to expose infirmities in the witness's direct testimony through cross-examination").

⁷¹ *Fensterer*, 474 U.S. at 20.

impose reasonable limits on such interactions.”⁷² A trial judge may impose “reasonable limit[at]ions] on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.”⁷³

In *Fensterer*, a jury convicted the defendant of murdering his fiancée.⁷⁴ The theory upon which the State based its case included circumstantial evidence that the defendant strangled the victim with a cat leash, which contained hair similar to the victim’s.⁷⁵ Thus, the entire case revolved around the testimony of an expert witness, Allen Robillard.⁷⁶ During his testimony, Robillard explained to the jury that one of the hairs on the cat leash, similar to that of the victim, appeared forcibly removed.⁷⁷ Robillard identified three ways in which a hair may be forcibly removed; however, when asked in which manner he concluded this particular hair had been removed, he could not recall the method on which he based his opinion.⁷⁸

The defendant requested that the court strike Robillard’s testimony because it precluded adequate cross-examination as to which method the expert used in his determination; however, the trial court denied the request.⁷⁹ The Delaware Supreme Court reversed the defendant’s conviction on the basis of the Confrontation Clause, reasoning that effective cross-examination required the witness to settle on a basis for his opinion to enable the defense to effectively attack Robillard’s credibility and discredit his testimony in the eyes of the jury.⁸⁰ Ultimately, the United States Supreme Court reversed the decision of the Delaware Supreme Court, holding that the witness’ inability to recall the theory upon which he based his opinion “did not offend the Confrontation Clause” since “the right to cross-examine is [not] denied . . . whenever the witness’ lapse of memory impedes one method of discrediting him.”⁸¹ The court reasoned that:

⁷² *Montes*, 893 N.Y.S.2d at 518.

⁷³ *See Van Arsdall I*, 475 U.S. at 679.

⁷⁴ *Fensterer*, 474 U.S. at 16.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 16-17.

⁷⁹ *Fensterer*, 474 U.S. at 17.

⁸⁰ *Id.* at 17-18.

⁸¹ *Id.* at 19-20, 22.

The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.⁸²

Therefore, the Court stated that the jury could infer from the witness' inability to recall the specific method employed to reach his conclusion that the expert witness lacked sufficient credibility throughout his entire testimony.⁸³

In *Delaware v. Van Arsdall*,⁸⁴ the Court further expanded its Confrontation Clause analysis by conducting a harmless error analysis. In *Van Arsdall*, during the cross-examination of a key witness, the defense counsel was prohibited from asking questions regarding the prosecution's dismissal of a criminal charge against the witness in exchange for the witness' cooperation at trial.⁸⁵ The court also refused to allow cross-examination regarding an unrelated homicide, with which the witness was allegedly involved.⁸⁶ Outside the presence of the jury, the witness assured the court that the agreement with the prosecutor's office failed to affect his testimony, and further, that the officers' questioning in the subsequent homicide investigation in no way influenced or affected his testimony.⁸⁷ Therefore, the trial court refused to allow cross-examination concerning the agreement and the homicide investigation.⁸⁸

The jury convicted the defendant, Robert Van Arsdall, of "first-degree murder and possession of a deadly weapon during the commission of a felony."⁸⁹ The Delaware Supreme Court reversed the conviction, stating that the trial court unlawfully restricted the de-

⁸² *Id.* at 21-22.

⁸³ *Id.* at 19.

⁸⁴ *Van Arsdall I*, 475 U.S. 673 (1986).

⁸⁵ *Id.* at 676.

⁸⁶ *Id.*

⁸⁷ *Id.* at 676-77.

⁸⁸ *Id.* at 676.

⁸⁹ *Van Arsdall I*, 475 U.S. at 677.

fense's right to an effective cross-examination, and thus violated the defendant's confrontation rights under the Sixth Amendment.⁹⁰ Further, "such [a] violation required automatic reversal"⁹¹ of the conviction since the refusal to allow cross-examination kept key facts from the jury concerning the witness' bias, an essential element in determining a witness' credibility.⁹²

The United States Supreme Court granted certiorari to determine whether this restriction on cross-examination violated the defendant's Sixth Amendment rights and whether this required an automatic reversal of the conviction.⁹³ The Court agreed with the Delaware Supreme Court and concluded that since "the trial court prohibited *all* inquiry into the possibility that [the witness] would be biased," the decision of the court violated the defendant's "rights secured by the Confrontation Clause."⁹⁴ However, the Court did not agree that such a violation required an automatic reversal of the conviction.⁹⁵ In this regard, the Court held that an improper denial of a constitutional right to confrontation "is subject to [the *Chapman v. California*]⁹⁶ harmless-error analysis," which requires a court to ask:

Whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt . . . [and weigh] factors [which] include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.⁹⁷

Rather than use "a per se error" reversal rule, which neglects to de-

⁹⁰ *Id.*

⁹¹ *Id.* at 674.

⁹² *Id.*

⁹³ *Delaware v. Van Arsdall* (*Van Arsdall II*), 473 U.S. 923 (1985).

⁹⁴ *Van Arsdall I*, 475 U.S. at 679.

⁹⁵ *Id.* at 674.

⁹⁶ 386 U.S. 18 (1967).

⁹⁷ *Van Arsdall I*, 475 U.S. at 684.

termine the “actual prejudicial impact of such an error,”⁹⁸ the Court remanded the case for a “determination whether the Confrontation Clause error in this case was harmless beyond a reasonable doubt.”⁹⁹

In his dissent, Justice Marshall agreed with the majority’s conclusion that a complete denial of questioning aimed to expose the bias of a particular witness violated the Confrontation Clause; however, he argued that since cross-examination is a vital part of a criminal trial, the denial of proper cross-examination “should lead to no less than a reversal of the conviction.”¹⁰⁰

The Second Circuit, in *Brinson v. Walker*,¹⁰¹ concluded that the limited cross-examination on the racial bias of the witness, “‘deprived the defendant of [disclosing] critical evidence that could have allowed the trier of fact to conclude that the complainant fabricated the robbery accusation.’”¹⁰² In *Brinson*, the defendant claimed that the trial court violated his constitutional right to confront the witnesses against him when it denied him the opportunity to question the victim regarding his racial bias.¹⁰³ Brinson, a black male, maintained that “Gavin’s accusation was a deliberate lie, motivated by Gavin’s racial hatred of black people.”¹⁰⁴ For this reason, the defense sought to cross-examine Gavin regarding his employment and his refusal to

⁹⁸ *Id.* at 677-78 (internal quotation marks omitted). Compare *Davis*, 415 U.S. at 318 (discussing the “per se error rule” and holding that “defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness,” therefore, the denial of effective cross-examination was a “‘constitutional error of the first magnitude’” (quoting *Brookhart v. Janis*, 384 U.S. 1, 3 (1966))), and *Van Arsdall I*, 475 U.S. at 688 (Marshall, J., dissenting) (“*Davis* mandates reversal whenever the prosecution puts a witness on the stand but the court does not permit the defense to cross-examine concerning relevant potential bias.”), with *Chapman*, 386 U.S. at 24 (discussing the “harmless-error analysis” in which a court must show “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained”).

⁹⁹ *Van Arsdall I*, 475 U.S. at 684 (majority opinion). See *Davis*, 415 U.S. at 317.

¹⁰⁰ *Van Arsdall I*, 475 U.S. at 686 (Marshall, J., dissenting). See *Pointer v. Texas*, 380 U.S. 400, 405 (1965) (noting that “cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal”). “*Davis* mandates reversal whenever the prosecution puts a witness on the stand but the court does not permit the defense to cross-examine concerning relevant potential bias.” *Van Arsdall I*, 475 U.S. at 688.

¹⁰¹ (*Brinson I*), 547 F.3d 387 (2d Cir. 2008).

¹⁰² *Id.* at 391 (quoting *Brinson v. Walker (Brinson II)*, 407 F. Supp. 2d 456, 480 (W.D.N.Y. 2006)).

¹⁰³ *Brinson I*, 547 F.3d at 389.

¹⁰⁴ *Id.* at 390.

serve black guests.¹⁰⁵ The trial court denied the defense the ability to cross-examine Gavin with regard to this issue since “evidence of *subsequent* racial bias was insufficient . . . to show any bias on the date involved in this crime.”¹⁰⁶

On appeal, the court affirmed the conviction “ruling that there was no right to cross-examine the accuser on such racial bias because it represented general ill will rather than specific hostility toward [the] defendant, and would thus have risked confusing the jury.”¹⁰⁷ Brinson brought a petition to the district court to set aside the conviction and the district court granted the writ of appeal.¹⁰⁸ The court stated that if the racial bias of a witness is “of sufficient intensity that it is reasonably likely to result in the falsification of the witness’s testimony against the accused, a preclusion of cross-examination . . . is an unreasonable application of Supreme Court decisional law.”¹⁰⁹ Thus, although a trial court maintains broad discretion to impose reasonable limitations on cross-examination, by prohibiting Brinson from questioning Gavin regarding his extreme racial bias, the trial court abused its discretion and violated the Confrontation Clause.¹¹⁰

The New York state courts take a somewhat more restrictive approach to the interpretation of the Confrontation Clause than the federal courts. The New York Court of Appeals in *People v. Corby*¹¹¹ employed a restrictive approach in determining whether the trial court violated the Confrontation Clause by deferring to the discretion of the trial judge.¹¹² In *Corby*, the jury convicted the defendant of murder in the second degree and first degree robbery.¹¹³ The defendant paid Xanderia Burnett for the use of her apartment to complete a drug transaction.¹¹⁴ The defendant and two other men awaited the arrival of a shipment of heroin, which the victim, Yousef Mohammed,

¹⁰⁵ *Id.* The defense sought to cross-examine Gavin “on whether he was fired from his job at the Perkins Restaurant for refusing to serve black patrons . . . Brinson [also] proposed to call the supervisor to testify to Gavin’s words in the event Gavin denied it.” *Id.*

¹⁰⁶ *Id.* (internal quotation marks omitted).

¹⁰⁷ *Brinson I*, 547 F.3d at 389 (internal quotation marks omitted).

¹⁰⁸ *Id.* at 391.

¹⁰⁹ *Id.* at 393.

¹¹⁰ *Id.* at 394-95.

¹¹¹ 844 N.E.2d 1135 (N.Y. 2005).

¹¹² *Id.* at 1136.

¹¹³ *Id.*

¹¹⁴ *Id.*

delivered.¹¹⁵ After the delivery, Burnett discovered Mohammed's bloody body laying face down on the bed.¹¹⁶ Burnett aided the defendant and the other men in removing the body from the apartment.¹¹⁷ When police questioned Burnett about the occurrence of the murder in her apartment, she denied having any knowledge of the incident.¹¹⁸ However, two years after the murder, the investigating detective informed Burnett that the defendant implicated her in the murder of Mohammed.¹¹⁹ As a result, Burnett identified the defendant and the two other men as the individuals who murdered Mohammed.¹²⁰

At trial, the defendant cross-examined Burnett; however, the court precluded any inquiry into her motivation for testifying against the defendant since such evidence would "confuse the jury, cause speculation and place defendant's alleged statement before the jury without the People having had the opportunity to cross-examine him."¹²¹ In affirming the decision of the courts below, the New York Court of Appeals reasoned that the trial court provided the defendant with wide latitude to show Burnett's motive to lie and permitted the scope of cross-examination to include questions which elicited both her "bias and hostility toward[s] [the] defendant."¹²² Further, the court reasoned that all of the testimony and evidence, which the jury accumulated throughout the trial, clearly showed Burnett's bias and motive to lie.¹²³

However, in his dissenting opinion, Justice Smith argued that the trial court precluded the defendant from questioning the witness regarding "the most crucial evidence that went to Burnett's motive to lie," and therefore, "deprived [the defendant] of his constitutional right to confront his accuser and present a defense."¹²⁴ Notably, "the

¹¹⁵ *Id.*

¹¹⁶ *Corby*, 844 N.E.2d at 1136.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1137.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Corby*, 844 N.E.2d at 1137.

¹²² *Id.*

¹²³ *Id.* at 1138. See *Chin*, 490 N.E.2d at 511 ("If bias or interest has been fully explored through other means, or the precluded area involved cumulative matter already presented, there generally has been no infringement of the right of confrontation." (internal citations omitted)).

¹²⁴ *Corby*, 844 N.E.2d at 1138 (G.B. Smith, J., dissenting).

People's case against defendant was only as strong as the testimony of Burnett," meaning that without her testimony the People would have a meritless claim.¹²⁵ "Because Burnett's testimony was so crucial to the People's case, defendant's cross-examination as to her motive to fabricate her testimony regarding who was responsible for the crimes was equally important to the defense."¹²⁶ Thus, the dissent declared that the lower courts erred in denying the defendant his constitutional right to confront his accuser, the only individual with evidence linking the defendant to the murder and further declared that the "error [was] not harmless beyond a reasonable doubt."¹²⁷

Contrary to the rationale of the dissent in *Corby*, the trial court in *People v. Alicea*¹²⁸ denied the defendant the ability to recall a witness "for further cross-examination based on newly acquired information."¹²⁹ On appeal, the appellate division affirmed the decision of the trial court, reasoning that the information for which further cross-examination was requested "had little impact on the witness's credibility."¹³⁰ In addition, the court stated the defendant "had the opportunity to acquire this information earlier in the proceedings, and could have elicited it during cross-examination."¹³¹ Finally, when offered the opportunity to enter into a stipulation to resolve the issue, the defendant refused the opportunity.¹³² The court declined to review the constitutional issue since the defendant failed to preserve his constitutional objection; however, the court stated that if the defendant preserved his objection, no violation existed because the defendant received a full opportunity to impeach the witness.¹³³

Conversely, in *People v. Vargas*¹³⁴ the New York Court of Appeals held that due to the centrality of the witness' testimony, the conviction of the defendant must be reversed and a new trial ordered

¹²⁵ *Id.* at 1139.

¹²⁶ *Id.*

¹²⁷ *Id.* at 1141.

¹²⁸ 821 N.Y.S.2d 584 (App. Div. 1st Dep't 2006).

¹²⁹ *Id.* at 585.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Alicea*, 821 N.Y.S.2d at 585.

¹³⁴ 668 N.E.2d 879 (N.Y. 1996). Four proceedings were consolidated under this title because they all possessed the common issue, which involved a defendant's right to be personally present at the sidebar during jury selection proceedings. The text discusses *People v. Pondexter*.

to determine whether the witness' testimony must be stricken from the record.¹³⁵

In *Vargas*, the defendant, during the commission of a robbery, shot and killed a man.¹³⁶ Sharon Valdez testified at trial as an eye-witness, claiming she observed the incident from her apartment window and was cross-examined by defense counsel.¹³⁷ However, after her testimony she informed defense counsel that "she had [actually] been asleep on the night of the incident and did not see anything that occurred."¹³⁸ Valdez again appeared in court and asserted her Fifth Amendment privilege against self-incrimination.¹³⁹ The defense moved to have Valdez's testimony stricken; however, the trial court denied the motion.¹⁴⁰

On appeal, the defendant claimed that although he cross-examined the witness during the trial, the trial court prevented him from fully cross-examining the witness after she recanted her prior incriminating testimony.¹⁴¹ The New York Court of Appeals ordered a new trial, reasoning that due to the centrality of Valdez's testimony, an eyewitness who identified the defendant as the murderer, the trial court erred when it denied striking the witness' testimony.¹⁴²

Both the United States Constitution and the New York State Constitution afford individuals the opportunity to confront witnesses against them through their respective Confrontation Clauses. The Confrontation Clauses provide an individual the opportunity to effectively cross-examine a witness in order to impeach them, reveal biases, or show the jury that the witness lacks credibility. However, the trial judge retains broad discretion to limit cross-examination in both federal and state courts.

The federal courts appear to put greater emphasis on the importance of cross-examination to the litigation process. As discussed in *Pointer*, the right to confront a witness is a fundamental right, which is necessary in order to ensure a defendant a fair trial. For this reason, it appears the federal courts afford the defense counsel an op-

¹³⁵ *Id.* at 887.

¹³⁶ *Id.* at 882.

¹³⁷ *Id.*

¹³⁸ *Id.* at 882-83.

¹³⁹ *Vargas*, 668 N.E.2d at 883. See U.S. CONST. amend. V.

¹⁴⁰ *Vargas*, 668 N.E.2d at 883.

¹⁴¹ *Id.* at 887.

¹⁴² *Id.*

portunity to conduct a broad-ranged cross-examination. On the other hand, while the state courts also appreciate the importance of cross-examination, the reviewing state courts easily find that the cross-examination conducted at the trial court level provided the defendant with an ample opportunity to confront the witnesses against him.

It is clear from both federal and state cases that when an issue arises as to whether the court afforded the defendant an ample opportunity to confront the witnesses against him, the courts conduct an analysis of several factors. A court will look at whether the trial judge provided the defendant with a full and fair opportunity to probe and expose the weaknesses in the witness' testimony. The courts will examine whether the court provided the defendant with an ample opportunity to expose the biases of the witness, which demonstrates the witness' overall credibility. Furthermore, the courts consider the overall impact of the testimony—whether the testimony consisted of a minor issue or concerned an issue central to the outcome of the case—in determining whether the trial court abused its discretion in limiting cross-examination.

In *Montes*, the court appears to have misapplied some of these factors. While the court afforded the defense an opportunity to cross-examine Ceballo, the defendant discovered new, crucial information once the cross-examination ended and the court prohibited further follow-up questioning once this information came to light. Additionally, the court failed to adequately allow the defense to expose Ceballo's bias as it pertained to her credibility. Because Ceballo acquired the gun or guns after the shooting, she possessed the motive to lie to protect her own interests. Further, without the ability to cross-examine her regarding this critical issue, the defendant lacked the opportunity to expose her bias to the jury. Lastly, the court erroneously categorized the issue of whether Gonzalez and Montes placed one or two guns into Ceballo's bag as only a minor portion of the testimony.

Similar to the testimony in *Vargas*, Ceballo's testimony was central to the determination of the case against the defendant. If Ceballo received one gun and Castro's testimony—that Gonzalez possessed the only gun and shot Lopez—remained uncontroverted, this clearly established the fact that the elements for possession of a weapon were not met. Also, as in *Vargas*, after the witness presented her testimony, new information—information conflicting with the testimony given on the stand—was revealed. The court in *Montes* should

have followed the reasoning in *Vargas* and concluded that due to the centrality of the witness' testimony, the trial court erred by failing to strike the testimony.

Although the reasoning in *Montes* is consistent with that of other New York State cases, in that the court deferred to the "reasonable" discretion of the trial court, the majority erred by failing to reverse the holding of the trial court, which stated that the court provided the defense with a full and fair opportunity to adequately cross-examine Ceballo. The majority should have followed the reasoning of the dissent, which is in conformity with the decisions of the United States Supreme Court and the Second Circuit.

The dissent in *Montes* supported the position that the court inaccurately interpreted controlling Confrontation Clause case law. Notably, the dissent distinguished the circumstances in *Montes* from the circumstances in *Alicea*. Similar to *Montes*, *Alicea* involved newly-acquired information. However, the court in *Alicea* reasoned that because the defense had access to the information prior to the cross-examination of the witness, the defense had the opportunity to discuss the information during the initial cross-examination. However, in *Montes*, the newly-acquired information only became available directly after the defense finished the cross-examination of the most critical witness. Therefore, without prior knowledge of this information, the defendant missed his opportunity to adequately cross-examine the witness. The reasoning of the majority is thus severely flawed since the newly-acquired information, which Ceballo failed to reveal in her testimony, provided critical new facts which may have fully exonerated the defendant.

Further, the dissent in *Montes* is strikingly similar to the dissent in *Corby*, which is also in conformity with the United States Supreme Court and Second Circuit case law. Like in *Montes*, the court in *Corby* refused to allow a full cross-examination of a key witness on the most crucial evidence presented at trial. Ceballo, like the key witness in *Corby*, possessed the only personal knowledge of the evidence directly linking the defendant to the gun. The prosecution repeatedly made Ceballo's testimony a "key issue" in the trial, interviewing her further after her direct and cross-examination testimony, and then introducing a new witness, a prisoner brought in to testify to the material that Ceballo failed to mention while on the stand. Without the ability to cross-examine the only witness with personal know-

ledge of the critical new evidence, the court violated Montes's Confrontation Clause rights.

Rather than deferring to the discretion of the trial court, the dissents in both *Montes* and *Corby* inquired into whether the court in fact afforded the defendant a full and fair opportunity to cross-examine the witnesses against them. Although the dissent recognized the importance of providing the trial judge with discretion to limit cross-examination, it also recognized the importance of a fair trial and the guarantee of a fundamental right afforded to a criminal defendant, the ability to confront witnesses against him. The latter recognition ultimately proved superior to the dissent's determination that the court violated the defendant's constitutional rights.

Lastly, the majority in *Montes* arbitrarily concluded that if the trial court in fact erred, the error was harmless beyond a reasonable doubt. The majority misplaced its reasoning based on inconclusive forensic evidence, which tended neither to convincingly prove nor disprove the existence of two guns at the scene of the crime when the shooting occurred. In accordance with the reasoning of the dissent, without Ceballo's testimony regarding the existence of two guns at the scene, the prosecution's case proved weak at best. Although the Court in *Van Arsdall* rejected the *per se* error rule, it adopted the harmless error analysis test, which required a showing that the error failed to contribute to the verdict. According to the dissent in *Montes* the error complained of weighed heavily on the verdict. Without the ability to recall Ceballo, or in the alternative to strike her testimony, the prosecution lacked any substantial evidentiary connection between the defendant and the shooting. Therefore, the error could not be regarded as harmless beyond a reasonable doubt.

If the New York Court of Appeals continues to uphold the inaccurate and flawed reasoning of the trial courts, adequate cross-examination will become a practice of the past. Trial judges must impose *reasonable* limitations on cross-examination, or risk eroding a fundamental right and critical procedure of litigation. Further, in order to prevent injustice and to guarantee a defendant a full and fair trial, the New York Court of Appeals must always conduct an independent investigation into whether the limitations placed on

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cross-examination by the trial court are in fact reasonable.

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